

and, when performed under the conditions normally present, would be considered “preliminary” or “postliminary” activities, include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks.<sup>49</sup>

(h) As indicated above, an activity which is a “preliminary” or “postliminary” activity under one set of circumstances may be a principal activity under other conditions.<sup>50</sup> This may be illustrated by the following example: Waiting before the time established for the commencement of work would be regarded as a preliminary activity when the employee voluntarily arrives at his place of employment earlier than he is either required or expected to arrive. Where, however, an employee is required by his employer to report at a particular hour at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee’s principal activities.<sup>51</sup> The difference in the two situations is that in the second the employee was engaged to wait while in the first the employee waited to be engaged.<sup>52</sup>

[12 FR 7655, Nov. 18, 1947, as amended at 35 FR 7383, May 12, 1970]

<sup>49</sup>See Senate Report p. 47. Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee’s “principal activity”. See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298. See also paragraph (h) of this section and § 790.8(c). This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

<sup>50</sup>See paragraph (b) of this section. See also footnote 49.

<sup>51</sup>Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2298.

<sup>52</sup>See *Skidmore v. Swift & Co.*, 323 U.S. 134, 7 WHR 1165.

#### § 790.8 “Principal” activities.

(a) An employer’s liabilities and obligations under the Fair Labor Standards Act with respect to the “principal” activities his employees are employed to perform are not changed in any way by section 4 of the Portal Act, and time devoted to such activities must be taken into account in computing hours worked to the same extent as it would if the Portal Act had not been enacted.<sup>53</sup> But before it can be determined whether an activity is “preliminary or postliminary to (the) principal activity or activities” which the employee is employed to perform, it is generally necessary to determine what are such “principal” activities.<sup>54</sup>

The use by Congress of the plural form “activities” in the statute makes it clear that in order for an activity to be a “principal” activity, it need not be predominant in some way over all other activities engaged in by the employee in performing his job;<sup>55</sup> rather, an employee may, for purposes of the Portal-to-Portal Act be engaged in several “principal” activities during the workday. The “principal” activities referred to in the statute are activities which the employee is “employed to perform”;<sup>56</sup> they do not include non-compensable “walking, riding, or traveling” of the type referred to in section 4 of the Act.<sup>57</sup> Several guides to determine what constitute “principal activities” was suggested in the legislative debates. One of the members of the

<sup>53</sup>See §§ 790.4 through 790.6 of this bulletin and part 785 of this chapter, which discusses the principles for determining hours worked under the Fair Labor Standards Act, as amended.

<sup>54</sup>Although certain “preliminary” and “postliminary” activities are expressly mentioned in the statute (see § 790.7(b)), they are described with reference to the place where principal activities are performed. Even as to these activities, therefore, identification of certain other activities as “principal” activities is necessary.

<sup>55</sup>Cf. *Edward F. Allison Co., Inc. v. Commissioner of Internal Revenue*, 63 F. (2d) 553 (C.C.A. 8, 1933).

<sup>56</sup>Cf. *Armour & Co. v. Wantock*, 323 U.S. 126, 132-134; *Skidmore v. Swift & Co.*, 323 U.S. 134, 136-137.

<sup>57</sup>See statement of Senator Cooper, 93 Cong. Rec. 2297.

conference committee stated to the House of Representatives that “the realities of industrial life,” rather than arbitrary standards, “are intended to be applied in defining the term ‘principal activity or activities,’” and that these words should “be interpreted with due regard to generally established compensation practices in the particular industry and trade.”<sup>58</sup> The legislative history further indicates that Congress intended the words “principal activities” to be construed liberally in the light of the foregoing principles to include any work of consequence performed for an employer, no matter when the work is performed.<sup>59</sup> A majority member of the committee which introduced this language into the bill explained to the Senate that it was considered “sufficiently broad to embrace within its terms such activities as are indispensable to the performance of productive work.”<sup>60</sup>

(b) The term “principal activities” includes all activities which are an integral part of a principal activity.<sup>61</sup> Two examples of what is meant by an integral part of a principal activity are found in the Report of the Judiciary Committee of the Senate on the Portal-to-Portal Bill.<sup>62</sup> They are the following:

(1) In connection with the operation of a lathe an employee will frequently at the commencement of his workday oil, grease or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

<sup>58</sup>Remarks of Representative Walter, 93 Cong. Rec. 4389. See also statements of Senator Cooper, 93 Cong. Rec. 2297, 2299.

<sup>59</sup>See statements of Senator Cooper, 93 Cong. Rec. 2296-2300. See also Senate Report, p. 48, and the President’s message to Congress on approval of the Portal Act, May 14, 1947 (93 Cong. Rec. 5281).

<sup>60</sup>See statement of Senator Cooper, 93 Cong. Rec. 2299.

<sup>61</sup>Senate Report, p. 48; statements of Senator Cooper, 93 Cong. Rec. 2297-2299.

<sup>62</sup>As stated in the Conference Report (p. 12), by Representative Gwynne in the House of Representatives (93 Cong. Rec. 4388) and by Senator Wiley in the Senate (93 Cong. Rec. 4371), the language of the provision here involved follows that of the Senate bill.

(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the work-benches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.

Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.<sup>63</sup>

(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance.<sup>64</sup> If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes,<sup>65</sup> changing clothes on the employer’s premises at the beginning and end of the workday would be an integral part of the employee’s principal activity.<sup>66</sup> On the other hand, if

<sup>63</sup>Statement of Senator Cooper, 93 Cong. Rec. 2297; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350. The fact that a period of 30 minutes was mentioned in the second example given by the committee does not mean that a different rule would apply where such preparatory activities take less time to perform. In a colloquy between Senators McGrath and Cooper, 93 Cong. Rec. 2298, Senator Cooper stated that “There was no definite purpose in using the words ‘30 minutes’ instead of 15 or 10 minutes or 5 minutes or any other number of minutes.” In reply to questions, he indicated that any amount of time spent in preparatory activities of the types referred to in the examples would be regarded as a part of the employee’s principal activity and within the compensable workday. Cf. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 693.

<sup>64</sup>See statements of Senator Cooper, 93 Cong. Rec. 2297-2299, 2377; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350.

<sup>65</sup>Such a situation may exist where the changing of clothes on the employer’s premises is required by law, by rules of the employer, or by the nature of the work. See footnote 49.

<sup>66</sup>See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298.

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changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity.<sup>67</sup> However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.<sup>67</sup>

[12 FR 7655, Nov. 18, 1947, as amended at 35 FR 7383, May 12, 1970]

### § 790.9 "Compensable \* \* \* by an express provision of a written or non-written contract."

(a) Where an employee engages in a "preliminary" or "postliminary" activity of the kind described in section 4(a) of the Portal Act and this activity is "compensable \* \* \* by an express provision of a written or nonwritten contract" applicable to the employment, section 4 does not operate to relieve the employer of liability or punishment under the Fair Labor Standards Act with respect to such activity,<sup>68</sup> and does not relieve the employer of any obligation he would otherwise have under that Act to include time spent in such activity in computing hours worked.<sup>69</sup>

(b) The word "compensable," is used in subsections (b), (c), and (d) of section 4 without qualification.<sup>70</sup> It is apparent from these provisions that "compensable" as used in the statute, means compensable in any amount.<sup>71</sup>

(c) The phrase "compensable by an express provision of a written or non-written contract" in section 4(b) of the Portal Act offers no difficulty where a written contract states that compensation shall be paid for the specific activities in question, naming them in

<sup>67</sup>See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2305-2306, 2362; statements of Senator Cooper, 93 Cong. Rec. 2296-2297, 2298.

<sup>68</sup>See § 790.4.

<sup>69</sup>See §§ 790.5 and 790.7.

<sup>70</sup>The word is also so used throughout section 2 of the Act which relates to past claims. See §§ 790.28-790.25.

<sup>71</sup>Cf. Conference Report, pp. 9, 10, 12, 13; message of the President to the Congress on approval of the Portal-to-Portal Act, May 14, 1947 (93 Cong. Rec. 5281).

explicit terms or identifying them through any appropriate language. Such a provision clearly falls within the statutory description.<sup>72</sup> The existence or nonexistence of an express provision making an activity compensable is more difficult to determine in the case of a nonwritten contract since there may well be conflicting recollections as to the exact terms of the agreement. The words "compensable by an express provision" indicate that both the intent of the parties to contract with respect to the activity in question and their intent to provide compensation for the employee's performance of the activity must satisfactorily appear from the express terms of the agreement.

(d) An activity of an employee is not "compensable by \* \* \* a written or nonwritten contract" within the meaning of section 4(b) of the Portal Act unless the contract making the activity compensable is one "between such employee,<sup>72</sup> his agent, or collective-bargaining representative and his employer."<sup>73</sup> Thus, a provision in a contract between a government agency and the employer, relating to compensation of the contractor's employees, would not in itself establish the compensability by "contract" of an activity, for purposes of section 4.

### § 790.10 "Compensable \* \* \* by a custom or practice."

(a) A "preliminary" or "postliminary" activity of the type described in section 4(a) of the Portal Act may be "compensable" within the meaning of section 4(b), by a custom or practice as well as by a contract. If it is so compensable, the relief afforded by section 4 is not available to the employer with respect to such activity,<sup>74</sup> and section 4(d) does not operate to exclude the time spent in such activity from hours worked under the Fair

<sup>72</sup>See colloquy between Senators Donnell and Lodge, 93 Cong. Rec. 2178; colloquies between Senators Donnell and Hawkes, 93 Cong. Rec. 2179, 2181-2182.

<sup>73</sup>The terms "employee" and "employer" have the same meaning as when used in the Fair Labor Standards Act. Portal-to-Portal Act, section 13(a).

<sup>74</sup>See § 790.4.